# (18,493.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1902.

No. 301.

---

D. N. HOLDEN AND LIZZIE HOLDEN, BANKRUPTS, APPELLANTS,

*vs.*

J. A. STRATTON, TRUSTEE.

---

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

---

INDEX.


| | Original. | Print. |
|---|---|---|
| Designation of record under rule 23 | 1 | 1 |
| Stipulation as to certain facts | 2 | 1 |
| Proceedings in district court of the United States for the district of Washington | 4 | 2 |
| Order consolidating cases Nos. 1953 and 1954 | 4 | 2 |
| Adjudication of bankruptcy | 5 | 2 |
| Order allowing exemptions | 6 | 3 |
| Policy No. 206,383. | 7 | 4 |
| Policy No. 303,921 | 14 | 7 |
| Petition for revision and review | 16 | 8 |
| Notice of petition for revision | 19 | 10 |
| Stipulation as to certain facts | 21 | 10 |
| Answer of respondents | 22 | 11 |
| Schedule A | 27 | 15 |
| Schedule B | 28 | 16 |


---

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 26, 1903.

1 In the United States Circuit Court of Appeals for the Ninth Circuit.

*In re* D. N. HOLDEN and LIZZIE HOLDEN, Bankrupts. No. —.

*Designation of Record under Rule 23.*

To the above-named bankrupts and to P. P. Carroll, your solicitor:

You and each of you will please take notice that the error of the district court upon which the undersigned trustee intends to rely in his petition for revision and review from the order of the district court for the district of Washington, northern division, dated July 16th, 1901, which petition has heretofore been filed and copy thereof served upon you, is the error of adjudging an exemption in favor of you and each of you of the two policies of insurance referred to in that petition. As necessary for the consideration thereof the petitioner aforesaid designates the following portions of the record to be printed:

1. Order consolidating causes 1953 and 1954.
2. Adjudication of bankruptcy.
3. Order of district judge awarding insurance exemption.
4. The insurance policies.
5. The petition for revision and review.

2 6. The notice of filing and calling up the petition for revision and review.

BAUSMAN & KELLEHER,
*Solicitors for J. A. Stratton, Trustee in Bankruptcy of D. N. Holden and Lizzie Holden, Bankrupts.*

Due service of foregoing designation of record under rule 23, and receipt of copy thereof, duly admitted this 7th day of August, 1901.

P. P. CARROLL,
By J. E. C.,
*Solicitor for D. N. Holden and Lizzie Holden, Bankrupts.*

(Endorsed:) 729. In the United States circuit court of appeals for the ninth circuit. *In re* D. N. Holden and Lizzie Holden, bankrupts. Designation of record under rule 23. Filed August 10, 1901. F. D. Monckton, clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

*In re* D. N. HOLDEN and LIZZIE HOLDEN, Bankrupts.

*Stipulation as to Certain Facts.*

It is hereby stipulated and agreed by and between Bausman and Kelleher, solicitors for J. A. Stratton, appellant and trustee, and P. P. Carroll, solicitor for said bankrupts, appellees:

3 That for the purpose of said appeal, it is admitted that Schedule "A," attached to said bankrupts' answer and cross-

petition, filed February 9th, 1901, shows that all and every of the liabilities of said bankrupts were made and contracted between the first day of September, 1900, and the first day of December, 1900; and that Schedule "A," attached to said bankrupts' claim of exemptions, filed April 4th, 1901, shows that said bankrupts claim that the life-insurance policies in controversy in this appeal are exempt under that certain law of the State of Washington, approved March 20, 1895, and as amended by an act of the legislature of said State, approved March 10, 1897; which said law as amended appears in the published laws of said State, designated as the Laws of Washington, session of 1897, page 70.

BAUSMAN & KELLEHER,
*Solicitors for Appellant.*
P. P. CARROLL,
*Solicitor for Appellees.*

(Endorsed:) No. 729. In the United States circuit court of appeals. *In re* D. N. Holden and Lizzie Holden, bankrupts. Stipulation as to certain facts. Filed August 19, 1901. F. D. Monckton, clerk. P. P. Carroll, solicitor for appellees.

4 In the District Court of the United States for the District of Washington, Northern Division. In Bankruptcy.

In the Matter of the Bankruptcy of D. N. HOLDEN. No. 1953.

In the Matter of the Bankruptcy of LIZZIE HOLDEN. No. 1954.

*Order Consolidating Causes.*

On motion of P. P. Carroll, attorney for respondents D. N. and Lizzie Holden, and counsel for petitioners in open court agreeing thereto:

It is ordered that said causes be, and are hereby, consolidated; and that respondents be, and are hereby, allowed to join in one and the same answer to said petitions.

C. H. HANFORD, *Judge.*

(Endorsed:) Order. Filed in the United States district court, district of Washington, 10 a. m. February 9, 1901. R. M. Hopkins, clerk. H. M. Walthew, deputy.

5 In the District Court of the United States for the District of Washington, Northern Division.

In the Matter of D. N. HOLDEN and LIZZIE HOLDEN, Bankrupts. Nos. 1953, 1954. Consolidated.

*Adjudication of Bankruptcy.*

The above-entitled matter having been referred to the undersigned, and the same coming on to be heard upon the petition of the creditor and the answer and cross-petition of the respondents,

said creditor appearing by its attorneys, Bausman, Kelleher & Emory, and the respondents appearing by their attorney, P. P. Carroll, it is considered that the said respondents, and each of them, are bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy.

Whereupon, it is ordered and adjudged that the said respondents, D. N. Holden and Lizzie Holden, and each of them, be, and they are hereby, declared bankrupt accordingly.

Dated at Seattle in said district on this 25th day of February, A. D. 1901.

JOHN P. HOYT,
*Referee in Bankruptcy.*

(Endorsed:) Adjudication of bankruptcy. Filed in the United States district court, district of Washington, July 19, 1901, 10.30 a. m. R. M. Hopkins, clerk. H. M. Walthew, deputy. Filed February 25th, 1901, at 11 o'clock a. m. John P. Hoyt, referee.

6 In the District Court of the United States for the District of Washington, Northern Division.

In the Matter of the Bankruptcy of D. N. and LIZZIE HOLDEN. Nos. 1953, 1954. Consolidated.

*Order Allowing Exemptions.*

This cause coming on this 15th day of July, 1901, to be heard on the report of the referee, filed herein on the 17th day of June, 1901, and the exceptions of said bankrupts to said report in denying to said bankrupts their claim of exemptions to the following life-insurance policies, to wit: policies numbered 206,383 and 303,921, issued on the 15th day of June, 1894, by the Northwestern Life Insurance Company, of Milwaukee, Wisconsin; and the court, after hearing arguments of counsel for and against said report, being fully satisfied in the premises, allows the exemption of said policies claimed by said bankrupts.

Wherefore, it is ordered and adjudged that the report of the referee be, and the same is hereby, vacated and set aside, and that the bankrupts, D. N. Holden and Lizzie Holden be, and they are hereby, allowed their said claim of exemption as to said life-insurance policies; and it is further ordered and adjudged that the said life-insurance policies be and they are hereby exempt from all debts and liabilities of said bankrupts, and from all claims of every kind and character made in these proceedings by the cred-
7 itors of said bankrupts, and that said life-insurance policies be returned to said bankrupts.

Done in open court this 16th day of July, 1901.

C. H. HANFORD, *Judge.*

(Endorsed:) Order allowing exemptions. Filed in the United States district court, district of Washington, 11.45 a. m., July 17, 1901. R. M. Hopkins, clerk. H. M. Walthew, deputy.

Policy No. 206,383.

206,383, number. Age, 30.
Amount, $5,000. Premium, $233.80.

The Northwestern Mutual Life Insurance Company, by this policy of assurance,

in consideration of the statements made in the application for this policy, which is hereby referred to and made a part of this contract, and in further consideration of the payment, at the company's office in Milwaukee, Wisconsin, of two hundred thirty-three and $\frac{80}{100}$ dollars, and of the annual payment of a like sum, to be made at said office, at or before noon on or before the 21st day of May in every year during the first ten years from May 21, 1890, date of former policy, promises to pay, at its said office, unto Lizzie Holden, beneficiary, wife of Daniel N. Holden, the insured, of Seattle, in
3 the county of King and State of Washington, the sum of five thousand dollars, in sixty days after due proof of the fact and cause of the death of said insured during the continuance of this policy; the balance of the year's premium, if any, and any other indebtedness to the company on account of this policy being first deducted therefrom; provided, however, that if the said beneficiary shall not survive the said insured then such payment shall be made to the executors, administrators or assigns of the said insured.

This policy is issued on the semi-tontine plan, and its tontine dividend period is twenty years.

This policy shall, if kept in force, share in the surplus, according to the company's usage, at each distribution after twenty years from May 21, 1890, until all contributions to the surplus found in the course of making such distributions to have arisen from this policy shall have been returned; but no dividend shall be payable at or after the time default may be made in the payment of any premium.

And the said company further promises and agrees that if, after three or more annual premiums shall have been paid in cash, default shall be made in the payment of any premium on the day it shall become due, this contract shall secure paid-up non-participating insurance for as many tenth parts of the original sum insured as there shall have been complete annual premiums so paid, on condition that this policy be freed from all indebtedness to the company; and a paid-up policy will be issued accordingly on surrender of this policy.

9 This policy shall not bind the company until the first premium shall be actually paid, while the said insured is in good health, to the company or to some person authorized by the company to receive it, and is issued and accepted by the parties in interest on the express conditions stated on the second page of this policy, which are hereby made part of this contract.

In witness whereof the Northwestern Mutual Life Insurance Company, at its office in Milwaukee, Wisconsin, has by its president and

secretary signed and delivered this contract, this fifteenth day of June, one thousand eight hundred and ninety-four.

H. L. PALMER, *President.*

J. W. SKINNER, *Secretary.*

The following is endorsed upon the face of said policy:

Upon surrender by the insured and beneficiary of a policy for $10,000 of like number and kind, dated May 21, 1890, this policy for $5,000 is issued at their request in lieu of one-half of the former policy; in all other respects this policy is made and accepted pursuant and subject to the application upon which the original policy was issued. A full-paid life non-participating policy, number 303,921, for $2,000 is issued in consideration of the surrender of one-half of the original policy.

Milwaukee, Wis., July 6, 1894.—Premiums on this policy may be paid semi-annually by paying in lieu of the annual premium as stated therein the semi-annual cash premium of one hundred twenty-one and $\frac{20}{100}$ dollars on the 21st day of May and November in each year.

10 *Conditions Referred to on the Preceding Page of this Policy.*

1st. If the said premiums shall not be paid at or before the times within mentioned for the payment thereof, then, and in every such case, this policy shall cease and determine; and no premium after the first, hereby acknowledged, shall be considered paid unless a receipt shall be given therefor, signed by the president or secretary, and the payment and receipt of any premium less than a full annual shall not have the effect to continue this policy in force longer than three months in case of a quarterly payment, or six months in case of a semi-annual payment.

2d. If any fraudulent representation or statement shall be made in the application for this policy, or if, within two years from the date hereof, the said insured shall pass south of the tropic of cancer, or shall be personally engaged in blasting, mining or submarine operations, or in the production of highly inflammable or explosive substances, or as engineer or fireman of any locomotive engine, or in switching or coupling or uncoupling cars, or be employed in any capacity on the trains of a railroad, except as passenger or sleeping-car conductor, mail agent, express messenger, or baggage master, or in ocean navigation, or shall enter or be engaged in any military or naval service (except in time of peace), or shall undertake an
11 aerial voyage, or shall die in consequence of a duel, or shall, whether sane or insane, die by his own hand, then, and in every such case, this policy shall be null and void.

3d. If the age has not been understated and death shall occur later than three years from the date hereof, the liability of the company shall not be disputed on account of any statement in the application, except in case of actual fraud.

4th. In every case where this policy shall cease or become void,

all payments thereon shall be forfeited to the company, but paid-up insurance will be granted as within provided.

5th. If, within five years from the date hereof, the said insured becomes habitually intemperate, or so far intemperate as to induce delirium tremens, then and in either such case the company may, within said five years, but during *this* lifetime, cancel this policy, and thereupon shall be absolved from all liability upon the same, except only that it shall pay the amount of the reserve, computed according to the now existing standard of the State of Wisconsin, if this policy be surrendered in the lifetime of the insured and within one year from the cancellation of the same.

6th. If this policy shall be assigned, a duplicate of the assignment shall, within thirty days, be given to the company, and due proof of interest shall be produced on making claim.

7th. No dividend shall be allowed or paid upon this policy,
12 unless the insured shall survive the completion of its tontine dividend period, and unless this policy shall then be in force.

8th. The condition last preceding being contained in all policies issued on the semi-tontine plan, all savings made in consequence of it shall be apportioned equitably among such policies issued on that plan as shall complete their tontine dividend periods; and in making such apportionment, savings from lapses occurring in any year shall be distributed among those policies only upon which premiums shall have been payable in that year.

9th. Upon the completion of the tontine dividend period, provided this policy shall not have been terminated previously by lapse or death, the said insured, and his assigns, if creditors, shall, without the consent of any other person named within as beneficiary, have the option either:

First, to withdraw in cash the accumulated surplus apportioned by the company to this policy, leaving the policy participating and full paid for its face;

Secondly, on furnishing satisfactory proof that the insured is then in good health, to apply said surplus to the purchase of a non-forfeitable participating paid-up addition to the face of this policy; or, without proof of good health, to apply said surplus to purchase an annuity at the company's published rates;

Thirdly, to surrender this policy and receive therefor in cash its entire share of assets, that is, the accumulated reserve, together with the surplus apportioned, which reserve the company guaran-
13 tees shall not be less than twenty-four hundred nine and $\frac{55}{100}$ dollars in addition to said surplus; or

Fourthly, to surrender this policy and apply said entire share of assets to the purchase of a non-participating paid-up policy, payable in case of death to the beneficiary therein named, if any, or otherwise to the executors, administrators or assigns of the said insured, provided that satisfactory proof be furnished that the insured is then in good health.

If no notice in writing of the way elected in which to apply the tontine dividend be given to the company within sixty days after

the completion of the tontine dividend period, then the tontine dividend shall be applied in the first way mentioned.

10th. No note can be accepted for any premium, nor can this policy be restored, in case of default in the payment of any premium, later than sixty days after the date of such default, and then only provided the insured furnishes evidence of good health, and provided also that the premium be paid with interest at the rate of seven per cent. per annum, before the expiration of said sixty days.

Filed in the United States district court, district of Washington. June 17, 1901.

R. M. HOPKINS, *Clerk.*
H. M. WALTHEW, *Deputy.*

14 Policy No. 303,921.

Number 303,921. Age, 34.
Amount, $2,000. Premium, ——.

The Northwestern Mutual Life Insurance Company, by this policy of assurance,

in consideration of the statements made in the application heretofore made for policy numbered 206,383, which application is hereby referred to and made a part of this contract, and in further consideration of the surrender of one-half of said policy, promises to pay, at its office, in Milwaukee, Wisconsin, unto Lizzie Holden, beneficiary, wife of Daniel N. Holden, the insured, of Seattle, in the county of King, State of Washington, the sum of two thousand dollars, in sixty days after due proof of the fact and cause of the death of said insured during the continuance of this policy; provided, however, that if the said beneficiary shall not survive the said insured, then such payment shall be made to the executors, administrators or assigns of the said insured.

This policy shall have no participation in the surplus of the company.

This policy is issued and accepted by the parties in interest on the express conditions stated on the second page of this policy, which are hereby made part of this contract.

In witness whereof, The Northwestern Mutual Life Insurance Company, at its office in Milwaukee, Wisconsin, has by its
15 president and secretary signed and delivered this contract, this fifteenth day of June, one thousand eight hundred and ninety-four.

H. L. PALMER, *President.*
J. W. SKINNER, *Secretary.*

*Conditions Referred to on the Preceding Page of this Policy.*

1st. If no fraudulent representation or statement has been made in the original application upon which this policy is based, and if the age has not been understated, the liability of the company

shall not be disputed on account of any statement in said application.

2d. If, within five years from May 21, 1890, the said insured becomes habitually intemperate, or so far intemperate as to induce delirium tremens, then and in either such case the company may, within said five years, but during his lifetime, cancel this policy, and thereupon shall be absolved from all liability upon the same, except only that it shall pay the amount of the reserve, computed according to the now-existing standard of the State of Wisconsin, if this policy be surrendered in the lifetime of the insured and within one year from the cancellation of the same.

3d. If this policy shall be assigned, a duplicate of the assignment shall, within thirty days, be given to the company, and due proof of interest shall be produced on making claim.

Filed in the United States district court, district of Washington. June 17, 1901.

R. M. HOPKINS, *Clerk.*
H. M. WALTHEW, *Deputy.*

(Endorsed:) No. 729. In the United States circuit court of
16 appeals for the ninth circuit. *In re* D. N. Holden and Lizzie Holden, bankrupts. Transcript of certain proceedings. Filed Aug. 10, 1901. F. D. Monckton, clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

*In re* D. N. HOLDEN and LIZZIE HOLDEN, Bankrupts. No. —.

*Petition for Revision and Review of Order of District Court in Bankruptcy.*

To the honorable the judges of the United States circuit court of appeals for the ninth circuit:

The petition of J. A. Stratton respectfully shows as follows:

I.

In the district court of the United States for the district of Washington, northern division, two separate proceedings were begun against D. N. Holden and Lizzie Holden, his wife, on the 19th day of January, 1901, to the end that they each be declared a bankrupt, and on the 9th day of February, 1901, these two proceedings were consolidated.

II.

Thereafter, on the 25th day of February, 1901, each of the
17 aforesaid Holdens was adjudged a bankrupt, and thereafter, in the same proceedings, your petitioner became the duly elected and qualified trustee in bankruptcy of each of their estates under the laws of the United States.

III.

Thereafter the aforesaid bankrupts, and each of them, claimed exemption in their favor of two certain policies of life insurance in the hands of the trustee upon the life of D. N. Holden, payable to Lizzie Holden, the wife. Of these policies copies are hereto annexed and made a part of this petition. As therein appears, these policies are respectively in the sum of $5,000 and $2,000 in the event of death, and have a present cash surrender value combined of about $2,200.

IV.

Such proceedings were had upon this application for exemption that the claim of the bankrupts was on the 17th day of June, 1901, denied by the referee; but upon certification of the matter to the district court, his action was, on July 16th, 1901, overruled and the exemption in favor of the bankrupts by order was allowed.

V.

Your petitioner, considering himself aggrieved by this order of the district court, respectfully applies to this honorable court for a revision and review thereof to the end that the claim of exemption of the bankrupts of these policies of insurance may be denied and the action of the lower court corrected, and that such orders emanate from this court as are necessary to that end. For this
18 purpose your petitioner annexes hereto a certified copy of so much of the record as will enable your honorable court to review and correct the action of the district court with due care and justice to all concerned.

J. A. STRATTON,
*As Trustee in Bankruptcy of D. N. Holden and Lizzie Holden, Bankrupts, Petitioner.*
BAUSMAN & KELLEHER,
*Counsel for Petitioner.*

UNITED STATES OF AMERICA,
*District of Washington, County of King,* } *ss:*

J. A. Stratton, being first duly sworn, on oath says: That he is the petitioner named in the foregoing petition; that he has read the same, knows the contents thereof and believes the same to be true.

J. A. STRATTON.

Subscribed and sworn to before me this 20th day of July, 1901.
[SEAL.]
JAY C. ALLEN,
*Notary Public in and for the State of Washington, Residing at Seattle.*

(Endorsed:) No. 729. Original. In the United States circuit court of appeals. *In re* D. N. Holden and Lizzie Holden, bankrupts. Petition for revision and review of order of district court in bankruptcy. Filed August 5, 1901. F. D. Monckton, clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

*In re* D. N. HOLDEN and LIZZIE HOLDEN, Bankrupts. No. —.

*Notice of Petition for Revision.*

To D. N. Holden and Lizzie Holden, bankrupts, and to P. P. Carroll, your solicitor:

You and each of you will please take notice that J. A. Stratton, trustee in bankruptcy in those certain consolidated causes numbered 1953 and 1954, in the district court of the United States for the district of Washington, northern division, wherein you were adjudged bankrupts, has filed in the United States circuit court of appeals for the ninth circuit his petition for a revision of that certain order of the district court aforesaid in the consolidated causes aforesaid made on the 16th day of July, 1901, allowing your claim of exemption of certain policies of insurance therein considered and reversing the ruling of the referee denying that exemption.

You will also take notice that the aforesaid trustee will call up for hearing the aforesaid petition at the regular annual Seattle term of the United States circuit court of appeals for the ninth
20 circuit, to be held on the second Monday of September next in the court-room of the United States district court for the district of Washington, northern division, in the city of Seattle, Washington, at the hour of eleven o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

BAUSMAN & KELLEHER,
*Solicitors for J. A. Stratton, Trustee in Bankruptcy of D. N. Holden and Lizzie Holden, Bankrupts.*

Received a copy of the foregoing notice, together with copy of petition for revision and record, this 7th day of August, 1901.

P. P. CARROLL,
By J. E. C.,
*Solicitor for D. N. Holden and Lizzie Holden, Bankrupts.*

(Endorsed:) 729. Original. In the United States circuit court of appeals for the ninth circuit. *In re* D. N. Holden and Lizzie Holden, bankrupts. Notice of petition for revision. Filed Aug. 10, 1901. F. D. Monckton, clerk.

21 In the United States Circuit Court of Appeals for the Ninth Circuit.

*In re* D. N. HOLDEN and LIZZIE HOLDEN, Bankrupts. No. —.

*Stipulation.*

It is hereby stipulated and agreed by and between Bausman and Kelleher, solicitors for J. A. Stratton, appellant and trustee, and P. P. Carroll, solicitor for said bankrupts, appellees:

That for the purpose of said appeal, it is admitted that Schedule "A," attached to said bankrupts' answer and cross-petition, filed February 9th, 1901, shows that all and every of the liabilities of said bankrupts were made and contracted between the first day of September, 1900, and the first day of December, 1900; and that Schedule "A," attached to said bankrupts' claim of exemptions, filed April 4th, 1901, shows that said bankrupts claim that the life-insurance policies in controversy in this appeal are exempt under that certain law of the State of Washington approved March 20, 1895, and as amended by an act of the legislature of said State, approved March 10, 1897; which said law as amended appears in the published laws of said State, designated as the Laws of Washington, session of 1897, page 70.

BAUSMAN AND KELLEHER,
*Solicitors for Appellant.*
P. P. CARROLL,
*Solicitor for Appellees.*

(Endorsed:) Stipulation as to certain facts. Filed August 19, 1901. F. D. Monckton, clerk.

22 In the District Court of the United States for the District of Washington, Northern Division.

In the Matter of D. N. HOLDEN and LIZZIE HOLDEN, Bankrupts. Nos. 1953, 1954. Consolidated.

*Answer.*

To the Honorable C. H. Hanford, judge of said court:

Comes now the above-named respondents D. N. Holden and Lizzie Holden, and by leave of court, consolidating said causes, join herein in this answer and response to the petition of the First National Bank of Seattle:

I.

Respondents admit the matters and things alleged in paragraphs I, II and III of the petition of said bank.

II.

Referring to the fourth paragraph of said petitions, respondents admit that said D. N. Holden and Lizzie Holden are insolvent, but respondents deny each and every other allegation made and contained therein.

III.

Respondents deny each and every allegation made and contained in the fifth paragraphs of said petitions of said bank, except as to the giving of the deed for $15,000.00 and the recording thereof.

IV.

Referring to the sixth paragraphs of said petitions, respondents admits that the conveyance referred to in said paragraphs "consists of the whole of said Holden's real estate;" but respondents deny each and every other allegation made and contained therein.

23

V.

Respondents deny each and every allegation made and contained in the seventh paragraphs of said petitions.

Respondents further answering said petitions respectfully show unto your honor:

I.

That respondents are now and at all the times and dates hereinafter mentioned were husband and wife.

II.

That on or about the 1st day of November, 1900, respondents owned one-half of the capital stock of the Holden and Wilson Furniture Company, a corporation organized under the laws of the State of Washington and *was* doing business in the city of Seattle, in said State; and that on said day Howard D. Thomas, Jr., was the owner of 175 shares of the capital stock of said company; and because of differences between respondents and said Thomas, respondents thought it best for their business interest in said company to buy the said stock of the said Thomas, and respondents agreed with said Thomas to buy said stock for $22,000.00, and said Thomas agreed to sell his said stock for $22,000.00 to respondents.

III.

That on the 5th day of November, 1900, respondents obtained a loan of eleven thousand five hundred dollars ($11,500.00) from Eugene F. Lawson; and that the money borrowed from said Lawson was paid according to agreement to said Thomas for his said stock; and respondent- gave to said Lawson their promissory note for said eleven thousand five hundred dollars ($11,500.00) payable ten days after date with — per cent. interest per annum, and to secure the payment of said note respondents delivered to said Lawson 175 shares of the capital stock of said company and the said Lawson was also to have as security the said stock of the said Thomas as soon as the same came into the possession of respondents.

24

IV.

That on or about the first day of December, 1900, respondents borrowed of said Lawson the further sum of thirty-five hundred dollars ($3500.00) and to secure the repayment of the same and the said note for $11,500.00 took up said note of November 5th, 1900,

for $11,500.00 and the said stock held as security and gave their note to said Lawson for fifteen thousand dollars ($15,000.00), payable January 1, 1901, with interest at six per cent. per annum, and to secure the payment of the said note for $15,000.00, gave a mortgage on all their real property, which mortgage was recorded in the auditor's office of said King county on the 12th day of December, 1900, and the money borrowed as aforesaid was expended as aforesaid and in the conduct of the said business of respondents.

V.

That on or about the 11th day of December, 1900, being convinced of their inability to pay said note for $15,000.00, to save expense and litigation, respondents deeded all their said real property to said Lawson in full satisfaction of said debt and the payment of said note, interest and mortgage.

Respondents further represent and show unto your honor:

I.

That on or about the 4th day of December, 1900, a receiver was appointed for the said Holden and Wilson Furniture Company, a corporation organized and doing business under the laws of the State of Washington, as hereinbefore in this answer set forth in the cause numbered 30,467 in the superior court of said State in and for the county of King, entitled The Seattle Mattress and Upholstery Company, plaintiff, *v.* The Holden and Wilson Furniture Company, defendant, and that the failure of said furniture company was the real cause of the failure of respondents.

II.

That respondents have resided in the city of Seattle, King county, Washington, for more than six months last past, and have had their principal place of business in said city; and that during said time respondents were engaged in the business and occupation of buying and selling household goods, fixtures and furniture within the said judicial district.

III.

That respondents owe debts which they are unable to pay; that they are willing to surrender all their property for the benefit of their creditors, except such as is exempt by law; and respondents desire to obtain the benefit of the acts of Congress relating to bankruptcy.

IV.

That the schedule hereto annexed marked A, and verified by your petitioners' oaths, contain a full and true statement of all their debts, and (so far as it is possible to ascertain) the names and places

of residence of their creditors, and such further statements concerning said debts as are required by the provisions of said acts:

That the schedule hereto annexed, marked B, and verified by your petitioners' oaths, contains an accurate inventory of all their property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts.

Wherefore your petitioners pray that they may be adjudged by the court to be bankrupts within the purview of said acts.

D. N. HOLDEN.
LIZZIE HOLDEN.

P. P. CARROLL, *Attorney.*

UNITED STATES OF AMERICA, }
*District of Washington,* } ss:

We, D. N. Holden and Lizzie Holden, the respondents mentioned and described in the foregoing answer, do hereby make solemn oath that the statements contained therein are true according to the best of our knowledge, information and belief.

D. N. HOLDEN,
LIZZIE HOLDEN,
*Respondents.*

26 Subscribed and sworn to before me this 8th day of February, A. D. 1901.

P. P. CARROLL,
*Notary Public in and for the State of Washington, Residing at Seattle.*

[NOTARIAL SEAL.]

SCHEDULE "A."

| Names of creditors. | Residence. | When and where contracted. | Nature and consideration. | Amount. |
|---|---|---|---|---|
| Holden & Wilson Furniture Company. | Seattle, Wash. | Seattle, Wash.. | Merchandise and money loaned. | $10,371.02 |
| Howard D. Thomas, Jr..... | " | 11, 5, '00.... ditto. | Stock purchased. | 6,000.00 |
| First national bank..... | do. | Between Sept. 1 and Dec. 1, 1900, at Seattle, Wash. | Money loaned. | 5,150.00 |
| Louch, Augustine & Co..... | do. | do. | Merchandise. | 204.85 |
| Z. C. Miles & Piper Co..... | do. | do. | do. | 12.40 |
| A. J. Prayer & Sons..... | do. | do. | do. | 64.00 |
| F. A. Buck & Co..... | do. | do. | do. | 285.00 |
| Seattle Ice Co..... | do. | do. | do. | 15.00 |
| Aggers-Bosworth Co..... | do. | do. | do. | 22.88 |
| Diamond Ice Co..... | do. | do. | do. | 14.25 |
| Hardy-Hall Arms Co..... | do. | do. | do. | 37.85 |
| The Kerry Lumber Co. .. | do. | do. | do. | 38.52 |
| Lilly, Bogardus Co..... | do. | do. | do. | 42.39 |
| Lowman & Hanford. ..... | ..... | ..... | ..... | |
| Stationery & P. Co ..... | do. | do. | Printing..... | 51.25 |
| Newells Mill & Mfg. Co..... | do. | do. | Lumber ..... | 110.00 |
| Pioneer Printing Co ..... | do. | do. | Printing.... | 76.25 |
| O. W. Peterson & Co ..... | do. | do. | Merchandise. | 29.75 |
| Pacific Printing Co..... | do. | do. | Printing..... | 16.50 |
| Eureka Baking Co..... | do. | do. | Merchandise. | 58.00 |
| Royal Dairy Co ..... | do. | do. | do. | 100.00 |
| The Seattle Electric Co ..... | do. | do. | Advertising.. | 10.00 |
| Standard Oil Co..... | do. | do. | Merchandise. | 16.92 |
| Seattle City Bill Posting Company. | do. | do. | Advertising . | 61.66 |
| M. Seller & Co ..... | do. | do. | Merchandise. | 40.28 |
| The John Schram Co..... | do. | do. | do. | 52.00 |
| Howard D. Thomas, Jr..... | do. | do. | Suit pending. | 4,500.00 |
| James Brownie..... | do. | do. | Judgment ... | 225.00 |
| Gordon & Co ..... | do. | do. | do. | 228.78 |
| Pacific Coast Co..... | do. | do. | Coal..... .. | 62.80 |
| G. H. Braas. ..... | do. | do. | Photographs. | 12.00 |
| Schwabacher Hardware Co... | do. | do. | Merchandise. | 50.23 |
| Stetson & Post Mill Co.... .. | do. | do. | do. | 27.32 |
| Galbrath, Bacon & Co..... | do. | do. | do. | 37.85 |
| Total..... | ..... | ..... | ..... | $28,024.75 |

D. N. HOLDEN,
LIZZIE HOLDEN,
*Respondents.*

UNITED STATES OF AMERICA, } ss:
*District of Washington,* }

On this 8th day of February, A. D. 1901, before me personally came D. N. Holden and Lizzie Holden, the persons mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all their estate, both real and personal, in accordance with the acts of Congress relating to bankruptcy.

[NOTARIAL SEAL.] P. P. CARROLL,
*Notary Public in and for the State of Washington, Residing at Seattle.*

28 SCHEDULE "B."

Respondents own or control no property, real or personal, other than their household furniture, goods and personal effects of about the value of five hundred dollars ($500.00).

D. N. HOLDEN,
LIZZIE HOLDEN,
*Respondents.*

UNITED STATES OF AMERICA, } ss:
*District of Washington,* }

On this 8th day of February, A. D. 1901, before me personally came D. N. Holden and Lizzie Holden, the persons mentioned in and who subscribed to the foregoing schedule, and who, being duly sworn, did declare the said schedule to be a statement of all their estate, both real and personal, in accordance with the acts of Congress relating to bankruptcy.

P. P. CARROLL,
[NOTARIAL SEAL.] *Notary Public in and for the State of Washington, Residing at Seattle.*

SEATTLE, *Feb'y 8th*, 1901.

Rec'd copy of the within answer.
BAUSMAN, KELLEHER & EMORY,
*Att'ys for Petitioner First National Bank of Seattle.*

(Indorsed:) Answer. Filed in the U. S. district court district of Washington Feb. 9, 1901 at 4 p. m. R. M. Hopkins, clerk, H. M. Walthew, deputy.

29 UNITED STATES OF AMERICA, } ss:
*District of Washington,* }

I, R. M. Hopkins, clerk of the district court of the United States for the district of Washington, do hereby certify that I have compared the foregoing copy with the original answer of bankrupts in the foregoing entitled cause, now on file and of record in my office at Seattle, and that the same is a true and perfect transcript of said original and of the whole thereof.

Witness my hand and the seal of said court this 13th day of September 1901.

R. M. HOPKINS, *Clerk*,
By H. M. WALTHEW, *Deputy*.

(Endorsed:) U. S. circuit court of appeals for the ninth circuit. No. 729. Certified copy of answer. Filed September 13, 1901. F. D. Monckton, clerk.

30 In the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of D. N. HOLDEN and LIZZIE HOLDEN, Bankrupts. No. 729.

Before McKenna, circuit justice, and Gilbert and Ross, circuit judges.

McKENNA, *Circuit Justice*:

This is a petition filed under section 24–*b* of the bankruptcy law of 1898, to renew and order of the district court for the district of Washington, northern division, made and entered in the above-entitled cause.

The said D. N. Holden and Lizzie Holden were separately proceeded against in bankruptcy by their creditors. The causes were consolidated by consent, and "one and the same answer" filed to the petitions. Subsequently it was adjudged that the "respondents and each of them are bankrupts within the true intent and meaning of the acts of Congress relating to bankruptcy."

The respondents then prayed exemption from the claims of creditors of two life-insurance policies. The claim was disallowed by the referee who made due report of his action to the court. The respondents filed exceptions to the report, and after hearing, the court, by an order duly entered on the 16th of July, 1901, vacated the report and adjudged the policies to be exempt. To review this order of the district court the present petition was filed by J. A. Stratton, the duly appointed trustee of the estates of said bankrupts. No answer has been filed to the petition, and the question is whether upon the facts stated the order in the district court should be revised.

31 The policies in question were issued on the 15th of June, 1894, by the Northwestern Life Insurance Company of Milwaukee, Wisconsin, and were respectively numbered 206,383 and 303,921, and were respectively for the amounts of $5,000 and $2,000. Daniel L. Holden was the insured in both, and Lizzie Holden was the beneficiary in both, with the provision, however, that if she should not survive him payment should be made to his executors, administrators and assigns.

It was provided in the policy No. 206,383 that it is "issued on the semi-tontine plan, and its tontine dividend period is twenty years,"

and the following is endorsed on the policy: "Upon surrender by the insured and beneficiary of a policy of $10,000 of like number and kind dated May 2nd, 1890, this policy for $5,000 is issued at their request in lieu of one-half of the former policy; in all other respects this policy is made and accepted pursuant and subject to the application upon which the original policy was issued. A full-paid life non-participating policy, No. 303,931, for $2,000 is issued in consideration of the surrender of one-half of the original policy."

It is alleged in the petition that the policies have a present cash surrender value combined of about $2,200; and it was stated on the argument that the creditors of each of the bankrupts are the same.

It is provided by the laws of the State of Washington "that the proceeds or values of all life insurance shall be exempt from all liability for any debt." (Laws 1895, p. 336.)

By section 70–*a* of the bankrupt law of 1898 it is provided that "the trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment or qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is
32 to property which is exempt, to all (1) documents relating to his property; (2) interests and patents, patent rights, copyrights, and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: *Provided*, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property."

Section 6 of the bankrupt law is as follows: "Exemptions of bankrupts. *a*—This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

The effect and extent of section 6 was considered by this court in the matter of Scheld, 44, C. C. A., 233, 104 Fed. Rep., 870, and it was said, that the purpose of the section did not pervade the whole act, but was controlled by section 70–*a*, and that under the latter section policies of insurance payable to the bankrupt himself, his

33 estate or personal representatives passed to the trustee of the estate. But we also said, "It will be seen that the clause of section 70 above quoted does not include policies of insurance payable to the wife, children or other kin of the bankrupt, but is limited to policies the proceeds of which are payable to the bankrupt himself, his estate or personal representatives. The enactment does not deprive the family of a debtor of the protection which he may have secured to them in taking out policies for their benefit payable at his death, but it does prevent debtors from availing themselves of the opportunity of making investments for their own benefit in the form of endowment policies, or policies payable to themselves, and holding the same, while seeking a discharge from their debts through the bankruptcy act."

What is the character of the policies in the case at bar? Are they covered by the proviso of section 70? It will be observed that the policies were not payable to either Holden or his wife absolutely but to her only, if she survived him, and to his personal representatives if he survived her. Subject to such contingent interest in him the policies and the money to become due under them belong to her, and it is beyond his power to transfer them to any other person or to surrender them. *In re* Heilbron's estate, 14 Wash. 336, citing Central Bank of Washington *v.* Hume, 128 U. S. 195, and other cases. Under the laws of Washington her interest in the policies became her separate property and was assignable by her,—2 May on Insurance 399 Q, and cases cited. Each therefore, has an interest in the policies, and each must be held to have an insurance policy which has a cash surrender value payable to him or to her, his or her estate or personal estate or personal representatives, and subject therefore to the provisions of section 70—in other words, passed to their respective trustees as assets of their respective estates. It may be that neither could surrender the policies without the consent of the other, but such right of surrender passed with the policies to their respective trustees.

34 In Steele *et al. v.* Buel *et al.*, 44 C. C. A. 287, the circuit court of appeals of the eight- circuit has decided that the rule of exemption of section 6 pervades the whole act, and is to be read into every other section and provision of the act. The difference of opinion between that learned court and this court demonstrates the ambiguity of the bankrupt act, and while not insensible to the necessity of harmony in the decisions of the courts of appeal, we are not disposed to depart from the ruling *in re* Scheld. There is a way open to respondents for a further review of the questions involved.

It follows that the order of the district court should be revised in accordance with this opinion, and it is so ordered.

(Endorsed:) Amended opinion. Filed January 16, 1902. F. D. Monckton, clerk.

35 United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of D. N. HOLDEN and LIZZIE HOLDEN, Bankrupts. No. 729.

Appeal from the district court of the United States for the district of Washington, northern division.

This cause came on to be heard on the transcript of the record from the district court of the United States for the district of Washington, northern division, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the order or decree of the said district court in this cause be, revised in accordance with the opinion of this court.

(Endorsed:) Decree (second). Filed and entered Jan. 16, 1902, F. D. Monckton, clerk.

36 In the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of D. N. HOLDEN and LIZZIE HOLDEN, Bankrupts. No. 729. Appeal.

The above-named bankrupts D. N. Holden and Lizzie Holden, conceiving themselves aggrieved by the decree entered on January 16, 1902, in the above-entitled proceeding, do hereby appeal from said decree to the Supreme Court of the United States, and they pray that this their appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

P. P. CARROLL,
JOHN E. CARROLL,
*Solicitors for D. N. Holden and Lizzie Holden,*
72 *Hinckley Block, Seattle, Wash.*

And now, to wit, on February 12th, 1902, it is ordered that the appeal be allowed as prayed for.

WM. B. GILBERT,
*Senior Circuit Judge.*

(Endorsed:) Appeal and order allowing appeal. Filed Feb. 12, 1902, F. D. Monckton, clerk. Copy of this order received this 13th February, 1902, Bausman & Kelleher, counsel for appellee.

37 In the United States Circuit Court of Appeals for the Ninth Circuit.

In the Mat'er of DANIEL N. HOLDEN and LIZZIE HOLDEN, Bankrupts. No. 729.

Comes now the above-named bankrupts, Daniel N. Holden and Lizzie Holden, by their solicitors, P. P. Carroll and John E. Carroll, and make the following assignment of errors, in the opinion and decree of this honorable court, filed herein respectively, on the 6th, and 16th, day of January, A. D., 1902.

First. It was error to find and hold that the life-insurance policies issued on the 15th, day of June, 1894, and numbered respectively, 206,383, and 303,921, to Daniel N. Holden, for the respective sums of $5,000.00, and $2,000.00, were not exempt under the bankrupt law.

Second. It was error to order that the decree of the district court, allowing said bankrupts' claim of exemption, be set aside.

Third. It was error not to find and hold that said policies of insurance and the proceeds thereof, were exempt under the bankrupt act, from all claims of the creditors of said bankrupts.

P. P. CARROLL,
JOHN E. CARROLL,
*Solicitors for Appellants.*

(Endorsed:) Assignment of errors. Filed Feb. 17, 1902. F. D. Monckton, clerk Due service admitted and copy received this 17 day of February, 1902. Bausman & Kelleher, solicitors for appellee.

38 In the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of DANIEL N. HOLDEN and LIZZIE HOLDEN, Bankrupts. No. 729.

Ordered that the above-named bankrupts be, and are hereby, allowed to prosecute their appeal to the Supreme Court of the United States without bond.

WM. B. GILBERT,
*United States Circuit Judge.*

To the entry of the foregoing order appellee Stratton, trustee, consents and that the appeal be prosecuted without bond, appellants advancing their own costs.

FREDERICK BAUSMAN,
*Solicitor for Stratton, Trustee, Appellee.*

(Endorsed:) Order and waiver of bond. Filed Feb. 17, 1902. F. D. Monckton, clerk.

39 United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of D. N. HOLDEN and LIZZIE HOLDEN. No. 729.

*Certificate of Clerk Circuit Court of Appeals to Transcript.*

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing thirty-eight (38) pages, numbered from one (1) to thirty-eight (38), inclusive, to be a full, true and correct copy of the printed record, and of the assignment of errors, and of all proceedings in the above-entitled matter as the same appear of record in my office, and that the same together constitute the transcript of record on appeal herein to the Supreme Court of the United States.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 19th day of March, A. D. 1902.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

40 UNITED STATES OF AMERICA, *ss:*

The President of the United States to J. A. Stratton, trustee, and to Bausman & Kelleher, his solicitors, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, in the District of Columbia within sixty days from the date hereof, pursuant to an order allowing an appeal of record in the office of the clerk of the United States circuit court of appeals for the ninth circuit in the matter of D. N. Holden and Lizzie Holden, bankrupts, and to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William B. Gilbert, senior United States circuit judge for the ninth circuit this 13th day of February, A. D. 1902.

WM. B. GILBERT,
*United States Circuit Judge.*

41 Service hereof by copy admitted this 13th day of February, A. D. 1902.

BAUSMAN & KELLEHER,
*Solicitors for J. A. Stratton, Trustee.*

[Endorsed:] No. 729. U. S. circuit court of appeals for the ninth circuit. In the matter of D. N. and Lizzie Holden bankrupts. Citation on appeal to Supreme Court U. S. Filed Feb. 13th, 1902. F. D. Monckton, clerk.

42 The above and foregoing transcript of record of appeal to the Supreme Court of the United States, in the matter of D. N. & Lizzie Holden is approved.

Dated at Seattle Mar. 24" 1902.

P. P. CARROLL,
JOHN E. CARROLL,
*Solicitors for Appellants.*

Endorsed on cover: File No. 18,493. U. S. C. C. of appeals, 9th circuit. Term No. 301. D. N. Holden and Lizzie Holden, bankrupts, appellants, *vs.* J. A. Stratton, trustee. Filed April 14th, 1902.

In the Supreme Court of the United States.

October Term, 1902.

D. N. HOLDEN and LIZZIE HOLDEN, Bankrupts, Appellants,
*vs.*
J. A. STRATTON, Trustee, Appellee.
} No. 301.

*Certificate.*

Whereas, the above-named appellants were duly adjudged bankrupts in the United States district court for the district of Washington, northern division, on the 25th day of February, 1901; and

Whereas, appellants duly claimed two certain life-insurance policies as exempt to them under the acts of Congress relating to bankruptcy; and

Whereas, said claim of exemption was allowed by said district court; and

Whereas, on petition to review, the United States circuit court of appeals for the ninth circuit dissallowed said claim of exemption;

Whereas, it appears that the United States circuit court of appeals for the eighth circuit allowed a similiar claim of exemption;

Now, therefore, on motion of P. P. Carroll and John E. Carroll, solicitors for appellants, this is to certify that in my opinion the determination of the question, or questions, involved in the allowance or rejection of appellants' said claim of exemption to said life-insurance policies is essential to a uniform construction of said bankruptcy act throughout the United States.

JOSEPH McKENNA,
*Associate Justice of the Supreme Court of the United States.*

[Endorsed:] No. 301. In the Supreme Court of the United States. D. N. Holden & Lizzie Holden, bankrupts, appellants, *vs.* J. A. Stratton, trustee, appellee. Certificate. Carroll & Carroll, att'ys for appellants, 72 Hinckley block, Seattle.

[Endorsed:] File No. 18,493. Supreme Court U. S., October term, 1902 Term No. 301. D. N. Holden *et al.*, app'ts, *vs.* J. A. Stratton, trustee. Certificate of Mr. Justice McKenna. Filed March 20, 1903.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1902

No. 301

---

D. N. HOLDEN AND LIZZIE HOLDEN, Appellants,

*vs.*

JAMES A. STRATTON, TRUSTEE, Appellee.

---

## STATEMENT OF THE CASE.

In January 1901, The First National Bank of Seattle, Washington, filed in the United States District Court, for the District of Washington, Northern Division, its petition setting forth that petitioner was a creditor of Daniel N. Holden and Lizzie Holden, his wife, that said Holdens were insolvent, and praying that they be adjudged to be bankrupts within the purview of the Acts of Congress relating to bankruptcy.

Said Holden and wife in answer to said petition admitted

their insolvency and prayed to be adjudged bankrupts. Thereafter they were duly adjudged bankrupts, and James A. Stratton, Esq., was duly elected and qualified as trustee in bankruptcy of their estates under the laws of the United States. Subsequently appellants claimed among other property exempt under the State law certain policies of life insurance which had been delivered to the trustee. These policies were issued on the 15th of June, 1894, by the Northwestern Life Insurance Company of Milwaukee, Wisconsin, and are numbered respectively 206,383, for $5,000.00; and 303,921 for $2,000.00. In both, Daniel N. Holden is the insured and Lizzie Holden, his wife, is named as the beneficiary. (The policies, according to the claim of trustee, if allowed, have a present combined cash surrender value of about $2,200.00. That they have any cash surrender value, we deny. This is one of our contentions.)

The Referee in Bankruptcy, Hon. John P. Hoyt, ex-Chief Justice of the Supreme Court of the State of Washington, ruled on June 17th, 1901, that said policies were not exempt, but passed and were vested in the said trustee. But the Referee in his certificate disallowing the exemption added, "In justification of said ruling, I desire to state and certify that if this question had been in my opinion, an open one in this circuit, I should have held that said policies of insurance were, under the term of said Bankrupt Laws, exempt to the Bankrupts and did not pass to the trustees; but the court of Appeals of this Circuit, having in the case of *In re Scheld, 104 Fed. 870*, passed upon this question and there being in my opinion no reason for distinguishing the case at bar from the above cited case, I feel bound to decide and certify as above stated. As Referee I do not feel that I would be justified in attempting to distinguish that case from this one, nor to make a ruling without regard thereto even although I am satisfied that the Court, in deciding said case improperly interpreted the bankrupt law of the United States."

On July 16th, 1901, the District Court after an exhaustive presentation of the issue by counsel for appellant and appellee, entered an order setting aside the action of the Referee and directing that said policies be turned over to appellants as exempt. Whereupon, appellee applied to the United States Circuit Court

of Appeals for the Ninth Circuit for a revision and review of the said order of the District Court to the end that the claim of exemption of appellants be denied and the action of the lower Court corrected. The case is now in this Honorable Court upon the appeal of said bankrupts from the decree of the said Circuit Court of Appeals setting aside the said order of the District Court, and declaring said policies to be not exempt.

## ASSIGNMENT OF ERRORS.

Appellants make the following assignment of errors in the opinion and decree of the honorable Circuit Court of Appeals, filed respectively in said Court on the 6th, and 16th day of January, A. D. 1902, to-wit:

FIRST. It was error to find and hold that the Life Insurance Policies issued to Daniel N. Holden on the 15th day of June, 1894, and numbered respectively 206383 and 303921, for the respective sums of $5,000.00, and $2,000.00, were not exempt under the Bankrupt Law.

SECOND. It was error to order that the decree of the District Court allowing said Bankrupts claim of exemption, be set aside.

THIRD. It was error not to find and hold that said Policies of Insurance and the proceeds thereof, were exempt under the Bankrupt Act, from all claims of the creditors of said Bankrupts.

## POINTS AND AUTHORITIES.

In the year 1897, the Legislature of the State of Washington enacted "That section one of an act entitled 'An act exempting the proceeds of Life Insurance from liability for debt, and declaring an emergency,' approved March 20, 1895, is amended as follows:

"SECTION 1. That the proceeds or avails of ALL life and accident insurance shall be exempt from all liability for any debt.

"SECTION 2. An emergency exists, and this act shall take effect immediately."

LAWS OF WASHINGTON 1897, PAGE 70.

It is stipulated by appellants and appellee "That all and every of the liabilities of said bankrupts were made and contracted between the first day of September, 1900, and the first day of December, 1900.

See Record, Page Abstract 3.

In 1898 Congress passed the Bankrupt Act, Section 6 of which declares:

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition." But section 70 of the act reads as follows:

"The trustee of the estate of a bankrupt upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt; to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him; provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy

shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of or injury to, his property."

The question then is, does the provis o in section 70 negative the absolute and unqualified rule of exemption as declared in section six, to-wit: the State law? We believe not, for as was said by Caldwell, Circuit Judge, in *Steel V. Buel*, (*104 Federal Reporter, page 968.*)

"This section (sec. 6) establishes the rule of exemption in the most absolute and unqualified terms, and that rule is the state law. * * * This rule of exemption, therefore, pervades the whole act, and is to be read into every other section and provision of the act. If Congress had intended to diminish or lessen the state exemptions in any case, and particularly if it had intended to subject to the payment of the bankrupt's debts his policies of life insurance which were exempt under the state law, that intention would undoubtedly have found expression in clear and unmistakable language in Section 6. That was the appropriate place for limiting or qualifying the state exemptions, if it was to be done at all. * * * How is it to be known what "is exempt?" There is but one source of information on that subject, and that is the state law adopted by Section 6, and the legal effect of this section is precisely the same as if it read, "except property which is exempt under the state law." This exception must be read into every other clause and provision of the section. The fifth clause of this section shows conclusively that the construction of the proviso contended for by the trustee is wholly inadmissible. By the plain language of this clause of this section, the trustee is invested with a title to all the bankrupt's "property which prior to the filing of the petition he could by any means have transferred * * *." Now, the bankrupt could have transferred every particle of property he owned prior to the filing of the petition, and why does not the trustee set up a claim to all of it under this clause? Because it is felt that if such a claim was made it must fail, for the reason that it would be preceived at once that to grant it would completely nullify section 6, and all exemptions under state laws leaving the bankrupt without any

exemption whatever. But there is just as much reason for the trustee claiming under this clause all the property exempt under the state law as there is for claiming a part of it. The difference is one of degree only. It is obvious that section 6 must be read into this clause, if that section is to have any effect at all, and the bankrupt to be allowed any exemptions. But the clause of the fifth paragraph immediately preceding the proviso, and to which the proviso, according to the accepted rule for the construction of provisos, must be referred, removes all doubt as to what is meant by the proviso. In connection it reads: "The trustee * * * shall be vested by operation of law with the title of the bankrupt * * * to all property which might have been levied upon and sold under judicial process: provided, that when any bankrupt shall have any insurance policy which has a cash surrender value," etc. What kind of an insurance policy is here meant? Plainly and obviously an insurance policy "which might have been levied upon and sold under judicial process," and as to such policies the proviso makes a provision by which the bankrupt may retain his policy by paying its cash surrender value, and thus retain the benefit of the low rate of premium obtained when he was younger, and which could not be obtained upon a new policy. Moreover, the proviso is to be read in the light of section 6, and made to harmonize with it and other provisions of section 70, and, giving due effect and operation to this rule of construction, the proviso means precisely what it would if it read, "provided, that when any bankrupt shall have any insurance policy *not exempt*." The italicized words or their equivalent are necessarily implied from the other provisions of this section as well as from the sweeping provisions of section 5, and what is implied in a statute is as much a part of it as what is expressed.

*U. S. v. Babbitt, 1 Black 61, 17 L. Ed. 94; Gelpcke v City of Dubuque, 1 Wall. 221, 17 L. Ed. 519; Wilson Co. v. Third Nat. Bank, 103 U. S. 770, 26 L. Ed. 488; Thurber V. Miller, 32 U. S. App. 209, 14 C. C. A. 432, 67 Fed. 371.*

"This construction gives effect to every provision of the act, and renders them harmonious."

The honorable Circuit Court of Appeals for the Ninth Circuit in *In re Scheld, 104 Fed. Reporter, 870*, being the decision referred to by Referee Hoyt, in his said certificate in this cause to the District Court, and by his honor, Justice McKenna, in the decision of this cause in the Court of Appeals, held that the proviso in section 70 is a specific limitation on section 6, and that the title to Life Insurance policies having a cash surrender value vests in the trustee, notwithstanding the exemption under the state laws.

In the Scheld case, the Court of Appeals does not make any extended analysis of the bankrupt act, but simply lays down the broad proposition that "the fact that this special clause is preceded by the word 'provided' does not in any sense limit the force thereof," citing

*Railroad Co., vs. Smith, 128 U. S. 174.*

But that part of R. R. vs. Smith, in regard to the term "provided" is mere *obiter dictum*, and was in no way necessary to and was not considered as a ground for the decision. And certainly the learned court in the Scheld case did not take into consideration the policy of Congress to always exempt to debtors and bankrupts the property exempt to them by the State law; nor, to give to the bankrupt act such a construction as would give effect to each and every part thereof. It seems a forced construction to say that "giving to the words used in section 70 their usual and fair import, they clearly declare that policies of insurance of the character of that in issue in this case pass to the trustee as part of the assets of the bankrupt."

In the Scheld case, the Court cites in *Re Lange (D. C.) 91, Fed. 361*, in support of their position, that the policies were not exempt. The doctrine in the Lange case was also urged but overruled in Steele vs. Buel, supra, for as is therein stated "the District Court, somewhat doubtedly, confirmed the ruling of the referee, on the authority of a previous decision of that court in *Re Lange (D. C.) 91 Fed. 361*, and thereupon the bankrupts appealed the case to this court." Judge Shiras, who decided the Lange case, afterwards in *In Re Steele 98 Fed. 79*, said: "

"I freely admit that the question (as to said exemptions) is not

free from doubt." Thus showing an additional weakness in the position taken by the Court in *Re Scheld*, which case is made decisive of the case at Bar.

Again, citing from *Steele vs. Buel, supra.*

"It has always been the policy of congress to exempt to debtors and bankrupts the property exempt to them by the state law. From the organization of the federal courts under the judiciary act of 1789, the law has been that creditors suing in those courts could not subject to execution property of their debtor exempt to him by the law of the state.

*Judiciary Act 1789 (1 Stat. 93, c 21); Wayman v. Southard, 10 Wheat. 1, 32, 6 L. Ed. 253; Lamaster v. Keeler, 123 U. S. 376, 8 Su. Ct. 197, 31 L. Ed. 238; Dartmouth Sav. Bank v. Bates (C. C.) 44 Fed. 546.*

"Confessedly, the creditors, who through the trustee are now seeking to subject these policies to the payment of their debts, could not have subjected them to the payment of their debts by execution or other legal process issuing either from the state or the federal courts. The same rule has obtained under the bankrupt acts, which have sometimes increased the exemptions, notably so under the act of 1867 (section 5045, Rev St.), but have never lessened or diminished them. An intention on the part of congress to violate or abolish this wise and uniform rule observed from the creation of our federal system should be made to appear by clear and unmistakable language. It will not be presumed from a doubtful or ambiguous provision fairly susceptible of any other construction. If congress was going to attack the state exemptions and lessen or diminish them in any degree, the exemption of life insurance policies would be the very last exemptions to be attacked. They are very generally esteemed the best and safest means by which a man of limited means, or one dependent on his daily earnings for his support, can make provision to preserve his family from suffering and want after his death. This is the view taken of life insurance policies by the supreme court of the United States. * * * Instead, therefore, of nullify-

ing the fundamental and basic rule of exemption established by section 6, and curtailing the exemption under the state law, the proviso in question was intended to and does give the bankrupt a right which, in states whose laws do not exempt policies of life insurance, he would not have without it. The proviso is operative in those states only whose laws do not exempt them. This construction removes all seeming conflict or inconsistency between section 6 and the proviso of section 70, and gives that effect to each which congress plainly intended they should have."

But for the sake of argument, suppose the proviso in section 70 limits the rule of exemptions as laid down in section 6. The question then arises, "do the two Holden policies come within the definition of policies having a cash surrender value?" The term "cash surrender value," as used in the Bankrupt Act, means the cash value—ascertainable by known rules—of a contract of insurance abandoned and given up for cancellation to the insurer by the owner, having contract right to do so.

*In re Welling (U. S. C. C. A.) 113 Fed. 189.*

In the case at bar, policy No. 303921, for $2000.00, is a non-participating paid-up policy, payable in case of death to Lizzie Holden, the beneficiary therein named. The policy does not contain any provisions as to surrender, nor options. In other words it does not come within the above definition. For as was said in Re Welling (Supra). "The surrender of the proviso is not the subject of negotiation or agreement, but of right. The proviso does not include those policies where the right to surrender is not given by the contract." And in the present case, as in the Welling case, surrender could only be legally accomplished through agreement with the company by the joint action of Holden and his wife. There exists no right in either the wife or husband, jointly or singly, to surrender. It could only be done by the joint action of the two by agreement with the assurance society. But in the Welling Case the court went further and found that while the policy did not fall within the terms of the proviso, the bankrupt had property therein which passed to his trustee, for by the terms of the policy in that case the bankrupt

was entitled to receive at the end of the tontine period the cash payment stipulated in the contract. But in the case at bar, the policy under consideration (No. 303921) does not give any vested contract rights as to any cash payments upon any dates certain, no payment being stipulated for except the $2000.00 upon the death of the insured. Hence, in Re Welling directly sustains our position as to the exemption of said policy No. 303921.

Let us now consider the other Holden policy, No. 206383, for $5000.00. The company by this contract agrees that, upon the payment of $233.80 on the 21st day of May in every year during the first ten years from May 21st, 1890, it will pay the said insurance to Lizzie Holden, wife of D. N. Holden, the insured, within sixty days after due proof of the fact and cause of the death of said insured. The premiums have all been paid. The policy contained the statement that it is issued on the Semi-Tontine Plan, and its Tontine Divided Period is twenty years, and that the policy shall share in the Surplus, according to company's usage, at each distribution after twenty years from May 21, 1890. There is endorsed upon the policy certain options which the insured may have upon the completion of the Tontine Dividend Period. The policy does not provide for any cash surrender value. Therefore, according to the Welling Case, it does not fall within the provisions of section 70 of the Bankrupt Act relating to a cash surrender value. But in that case, the Court held that though the policy had no "cash surrender value," within the meaning of the proviso, it had an actual value, which constituted a right of property in the bankrupt, and which could have been transfered by him. And therefore passed to the trustee. In the Welling Case the law of the state of the domicile of the bankrupt *does not* exempt policies of insurance. But we review it here to show to your Honors that even where the question as to the construction to be given to the proviso is not raised, there is much difference of opinion as to just what life insurance policies do pass to the trustee. After careful study of the case of in Re Welling, we are firmly convinced that the dissenting opinion of Circuit Judge Grosscup in that case states the law correctly, and that this Honorable Court can directly see the force and

logic of his position, we cite therefrom the following:

"* * * Another term of the option is (as in the case at bar) that the election shall be by the husband himself. No one else can stand in his place, or exercise the option under the circumstances and sense of obligation that would influence him. * * * I am of the opinion that a fair interpretation of the spirit of the policy would disallow the exercise of the option of Welling until the day for its exercise had arrived, and would then disallow its exercise, unless it be by the judgment of Welling himself. Such an interpretation, of course, forbids the view that the option is transferable in advance—in this case six years in advance—or was subject to levy by creditors."

If in the Welling case the option is not transferable six years in advance' how much more reason there is that in the case at bar, it should not be transferable ten years in advance, and especially as no definite sum is guaranteed in the Holden policy to be paid upon its surrender at the completion of the Tontine Dividend Period.

It may not be out of place to refer here to the case of *In Re Heilborn's Estate, 14 Wash. P. 536,* Cited by Justice McKenna in the opinion filed in the Circuit Court of Appeals in this case. In the Heilbron case the policies were made payable to Heilbron's executors in case of his death. By the terms of his will, his brother W. C. Heilbron was bequeathed of the sum of $5,000.00. Other legacies were bequeathed by the deceased. ~~The brother, W. C. Heilbron was bequeathed the sum of $5,000. Other legacies were bequeathed by the deceased.~~ The brother of C. W. Heilbron assigned his interest to the Guarantee Loan and Trust Co. of Seattle. According to opinion of the Supreme Court of Washington, it appears that George H. Heilbron died insolvent, and was insolvent at the time of making the will. In that case it argued, according to the opinion of the court, that the policies of insurance belonging to the estate were liable for the debts of the deceased; that these debts were incurred prior to the enactment of the law exempting the policies of life insurance from liability for debt. The Holden policies are not payable to the executors of the estate. In the Heilbron case, the estate of the deceased became the ben-

ificary, and afortiori the creditors. In this case the wife is made the beneficiary and the policies are only payable upon conditions precedent, and these conditions precedent require the concurrence of three wills, and these conditons or concurrence may be in the future, in fact must be in the future, that is leaving out the question of death. Three minds must agree before anything can be had from the policies until the consummation of a time certain and fixed in the policies. Can the creditors in this case, through their trustee, force a concurrence of minds? Can they compel the Insurance Company, against its will, to shorten the time fixed in the policies? In other words, can the trustee destroy the object of the insurance and so destroy or annul the benevolent act of the state?

Should this Honorable court hold that the policies here in issue are not exempt under the Bankrupt Act, the question would then arise: has congress the power to abrogate state exemption laws?

Whatever is not conferred in the Constitution is withheld. and belongs to the several states, or to the people thereof.

Cooley's principles of Constitution Law, p 29.

Any enactment of Congress which is opposed to the provisions of the Constution, or is not within the grant of powers made by it, is unconstitutional.

Idem. p. 31.

Hence, as no such grant of power has been made to it, Congress has never claimed the right to abrogate state exemption laws.

In re Beckerford, 1 Dillon 45.

Nor is any such right properly an incident to an expressed power in the constitution, and necessary to its execution.

But to give the exemption phase of the Bankrupt Act the construction contended for by the Trustees, and as laid down by the Circuit of Court of Appeals, would in effect be giving to Congress the unauthorized power to abrogate and annul state exemption laws.

We beg your Honors' indulgence while we discuss this feature of the case a little further. Under Art. I Sec. 8, among other powers, Congress has the following: "To estabish an uniform

rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States." And here let us not forget that ours is a Republican form of government, or in other words, an agreement of the people, for the people, and by the people; A constitutional democracy.

This is implied by articles 9 and 10 of the amendments. The Constitution reads thus: (Art. 9.)—"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." (Art. 10.)—"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Here then is a limitation on the powers of Congress. It seems to us it cannot be successfully argued that the State has not reserved the power to legislate, within its own sovereign domain, for the people claiming citizenship, personal and proper rights within the Commonwealth. The state in its beneficence has seen proper to exempt among other property, from liability for debt, life insurance.

"That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugance in conferring on one government a power to control the constitutional measures of another, which other, in respect to those very measures, is declared to be supreme over that which exerts the control,—are propositions not to be denied."

*Cooley on Principles of Constitutional Law, 61. McCulloch v. Maryland, 4 Wheat. 316, 431.*

"It is true that taxation does not necessarily and unavoidably destroy, and that to carry it to the excess of destruction would be an abuse not to be anticipated; but the very power would take from the States a portion of their intended liberty of independent action within the sphere of their powers, and would constitute to the State a perpetual danger of embarrassment and possible annihilation. The Constitution contemplates no such shackles upon state power, and by implication forbids them.

*Cooley, Id, p. 62.*

The power of the States to protect the lives, health, and property of their citizens, and to preserve good order and public morals is a power originally and always belonging to the states, and not surrendered by them to the general government.

*United States v E. C. Knight Co., 156, U. S. I.*

If then the power of the State to protect the lives, health and property of its citizens, and to preserve good order and public morals, is a power originally and always belonging to the state and has not been surrendered by it to the general government, how will Congress undertake within the constitution to annul and abrogate a law exempting the property of a citizen from liability for debt?

While Congress has a right to enact the Bankrupt Law and make it uniform throughout the United States, still we have seen that that uniformity does not consist in exemptions, for many of the States differ in their exemption laws, and notwithstanding this difference, which is in a measure the lack of uniformity, the Bankrupt law has been held by this Honorable Court to be constitutional while this non-uniformity has existed. Again we put the question to your Honors, has Congress the power to abrogate and destroy the exemption laws of a state? Is that not a law regulating property rights?

Respectfully Submitted.

George Turner.

P. P. CARROLL,
JOHN E. CARROLL
Solicitors for Appellant.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1902

No. 301

---

D. N. HOLDEN AND LIZZIE HOLDEN, BANKRUPTS,
APPELLANTS

*vs.*

J. A. STRATTON, TRUSTEE,
APPELLEE

---

Come now the above named appellants, by their attorneys, George Turner, P. P. Carroll and John E. Carroll, and move the court for an order striking the motion of appellee to dismiss the appeal herein, and to strike his brief in support thereof for this, to-wit:

That at the time appellee served his notice and motion to dismiss he did not serve appellants with a copy of his brief or argument, nor did he serve any brief or argument more than 30 days prior to the time fixed for hearing his said motion, as required by Rule 6 of this court.

GEORGE TURNER,
P. P. CARROLL,
JOHN E. CARROLL,
Solicitors for Appellants.

## BRIEF ON MOTION TO STRIKE.

This court, by Rule 6, has provided that "The party moving to dismiss shall serve notice of the motion, with a copy of his brief or argument, on the counsel for plaintiff in error or appellant of record in this court, at least three weeks before the time fixed for submitting the motion, in all cases except where the counsel resides west of the Rocky Mountains, in which case notice shall be at least thirty days." This rule was undoubtedly intended to give counsel for appellant a reasonable time in which to prepare and submit a brief in opposition to such motion Since appellee has had a year in which to make a motion to dismiss the appeal, we believe that this court will be warranted in giving a strict construction and application to Rule 6, and to grant the motion to strike on the ground that appellants are not allowed a reasonable time, as provided by Rule 6, in which to file their brief in opposition to the motion. Appellee's brief was served on April 13, 1903, and the notice, served March 21, 1903, calls his motion to dismiss for May 4, 1903.

## APPELLANTS' BRIEF IN OPPOSITION TO APPELLE'S MOTION TO DISMISS.

We will take up in order the three grounds of dismissal as assigned by appellee, to be considered in the event this court denies appellants' motion to strike.

Appellee's motion to dismiss was made after the filing and serving of appellants' brief on the merits.

His first ground for dismissal is "That no appeal lies to this court at all in this proceeding."

We submit that sections 24a and 25 of the Bankruptcy Act amply provide for our appeal, and sufficiently answer the objection made by appellee.

There is nothing in the Bankrupt Act or the General Orders of this court that denies us the right to appeal from the judgment of the Circuit Court of Appeals.

This is an equitable proceeding, and the court having the record before it, will dispose of the subject in issue, if possible.

While much of the present act is borrowed from the act of 1867, we are convinced, however, that these acts must be studied as a whole.

There is much difference between them, and you cannot take one particular section or sub-division of the act of 1867 and limit a right growing out of the present act by the construction of any particular section of the former. There are many things that can be done in the present act in the way of appeal that could not be done under the act of 1867, as for instance from an order granting or refusing a discharge to the bankrupt, which under the former statute was not appealable.

The citations on page 4 of appellee's brief do not govern in this cause, and at this time.

Appellee has some doubt as to what is meant by "claim." We do not believe the word has in law a technical meaning, consequently when the law makers used "claim" they must have had in mind the common definition of the word. In fact appellee's position seems so manifestly erroneous, we do not deem it necessary to argue further in regard thereto, except to quote the dictionary's definition of the word: and where else can this court go for its meaning? Certainly the legislature must have had

in mind the lexicographer's use of the word, and are you not bound by what Congress so clearly intended?

CLAIM (clameus, clamius, claimea, clameum, clamor, vendicato.) A challenge (or demand) by any man, of the property or ownership of a thing (or of some interest in it), which he has not in possession, but which is withholden from him unlawfully. An unascertained right to property in the possession of another. A right or title, actual or supposed, to a debt, privilege, or other thing in the possession of another. The means to an end, and not the end itself. A demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty.

*Burrill's Law Dictionary,* Vol. 1, p. 296.

II.

"The decree appealed from was not final." Whether a decree is final and appealable is to be decided by the appellate court on a consideration of the essence of what is done by the decree.

*Potter v. Beal,* 50 Fed. 860.

In other words, if the lower court is given no discretion, if nothing further is to be done there except to carry out the specific directions of the higher court, which when complied with will end the controversy, it is a final judgment.

In the case at bar, the Court of Appeals in its opinion said that the policies of insurance "passed to their (appellants') respective trustees." And the district court was directed to revise its order in accordance with the opinion. Now, then, what discretion is lodged in the District Court? What else is to be done except to carry out

the specific directions of the higher court, viz: to order the policies turned over to the trustee as part of the assets of the bankrupts' estates, which when complied with must end the controversy. Appellee suggests that the District Court would have the right to hear further proof. But we submit that no such right is given in the opinion, and, furthermore, what further proof could be had, for do not the policies speak for themselves? Could any possible proof be taken that would in the least change the decree of the Court of Appeals? We say no, for there are no issues of fact involved—purely issues of law.

III.

"There are no findings under Order 36."

This rule was enacted to expedite the business of this Court. It was intended to save your honors the labor of going through long records in search of disputed facts. But in this case there are no facts in dispute. No testimony whatever has ever been taken. The record is short—in fact any statement by the Court of Appeals could hardly abridge it. The opinion (Record, pages 17-19) of the Court of Appeals sets forth all the facts that are necessary for the determination of this appeal upon the record.

Appellee says there is need of a finding as to the amount in controversy. But he himself says under oath (Record, p. 9) that in July, 1901, the value of the two policies was about $2,200.00. (See Opinion, Record, p. 18.) Certainly it would not be a less amount now. We deny that they have any "cash surrender value." But this raises purely a question of law, of what is meant by "cash surrender value," which we have fully discussed in our first brief (pp. 9-11).

In the case at bar the questions of law involved are im-

portant, and should have an early solution. Therefore this court will be warranted in overlooking the question of practice, and in determining the questions of law present- You can take the facts stated in the opinion of the court below as the established facts. Whether or not we have fully complied with the rule of this court does not affect its jurisdiction, and is no ground for dismissal of the case.

*U. S. v. Adams,* 6 Wallace, 101.

*In re Richards,* 96 Fed., 935.

If findings are necessary, this can be rectified by a remand, and without dismissing the case.

*U. S. v. Adams,* 6 Wallace, 101.

And should your honors deem findings essential, we respectfully move that the record be remanded to the Court of Appeals with directions accordingly.

In reviewing appellee's motion to dismiss, several points are brought to mind.

First, this court will bear in mind that here a constitutional question is involved. (See our first brief, pp. 12-14.) This point was raised in our oral argument, and in our brief, before the Court of Appeals, and we desire to press it here.

Second, the Court of Appeals was without jurisdiction to exercise its supervisory powers in this proceeding.

Section 25a of the Bankrupt Act provides:

"That appeals * * * may be taken * * * to the Circuit Court of Appeals * * * in the following cases, to-wit: * * * (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over."

Inasmuch as Congress has seen fit to prescribe by this section the method in which a judgment allowing or rejecting a claim may be reviewed, it is manifest that such judgments cannot be reviewed on an original petition filed in the Court of Appeals in the mode prescribed by subdivision "b" of section 24. It is improbable that it was the intention of the law maker to allow such a judgment to be reviewed otherwise than by appeal, and within the time expressly limited by section 25, to-wit: ten days.

*In re Good*, 99 Fed. 398.

Notwithstanding this, we allowed appellee to pursue the case in the Court of Appeals without objection, for we treated his proceeding as an appeal which he must afterwards have concurred in, for see the stipulation in the record, pp. 10-11, and note the word "appeal" so distinctly used.

True, his appeal was not taken within the ten days, but we desired more than anything else an expression from this court on the constitutional question here raised.

Third, that this court is "invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy, from which they have appellate jurisdiction in other cases." (Bankruptcy Act, Sec. 24a.)

Now, considering the constitutional question here involved, who can say that we have not the right to appeal?

We now lay stress upon the following, and submit to the court whether this cause should not have gone to the Circuit Court of Appeals by appeal instead of by original petition. If your honors decide that appellee should have appealed to the Circuit Court of Appeals, then your honors must find that the Court of Appeals was without

jurisdiction, because no appeal was taken within the time allowed by statute and the rules. If this is true in law, then this court is without jurisdiction, and all proceedings following the judgment of the District Court are of no effect, and the judgment of the District Court will stand.

Respectfully submitted,

GEORGE TURNER,
P. P. CARROLL,
JOHN E. CARROLL,
Solicitors for Appellant.

18493

# Supreme Court of the United States

October Term 1902

No. 301.

D. N. HOLDEN and LIZZIE HOLDEN, Bankrupts, *Appellants*,

vs.

J. A. STRATTON, Trustee.

## BRIEF ON MOTION TO DISMISS

### NOTICE OF MOTION TO DISMISS.

To appellants Holden, and to Messrs. George Turner, P. P. Carroll, and John E. Carroll, your solicitors:

You and each of you will please take notice that appellee will call up for hearing the annexed motion to dismiss before the above entitled court on Monday, May 4th, 1903,

at the convening of the court, or as soon thereafter as counsel can be heard.

FREDERICK BAUSMAN.
Counsel for Appellee.

Due service of foregoing notice of motion to dismiss and of within motion to dismiss acknowledged and accepted this 21st day of March, 1903.

GEORGE TURNER,
P. P. CARROLL,
JOHN E. CARROLL.
Solicitors for Appellants.

---

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 301.

D. N. HOLDEN, et al., Bankrupts,
Appellants.
vs.
J. A. STRATTON, Trustee.

MOTION TO DISMISS.

Appellee respectfully moves the court for an order dismissing the appeal on the following grounds:

1. No appeal lies to this court at all in this proceeding.

2. The judgment or decree appealed from was not a final one.

3. No findings of fact or conclusions of law, separate or at all, were found or requested of the Circuit Court of Appeals, as required by General Order in Bankruptcy No. 36 of this court.

FREDERICK BAUSMAN.
Counsel for Appellee.

---

## BRIEF.

The bankrupts Holden were allowed to retain two life insurance policies by the district court. On original petition for revision and review, the court of appeals overruled that order, whereupon the bankrupts have appealed here.

Appellee, the trustee, will present his grounds of dismissal under the three heads assigned in the motion.

### I.

*No appeal lies in this proceeding.*

(a)

This case did not come to the circuit court of appeals from the district court *by appeal*. It was an original petition there. It was a petition for revision and review (8, 17), under section 24 b of the bankrupt act. Now, can there be appeal to this court from a "revision and review" in the court of appeal?

Under the existing, as under the old, bankrupt act, parties aggrieved in the district court could get to the intermediate appellate court either by appeal or by petition for review. The former provided a general, the latter a particular, reconsideration, and, while the one was deliberate,

the other was summary. The following cases, from five different circuits, show that 24 b of the present act, allowing an original petition in the intermediate appellate court, was borrowed from the act of 1867. (*In re Abraham*, 93 Fed. at 783; *in re Richards*, 96 Fed., at 935; *in re Courier Journal Company*, 101 Fed., 702; *in re Worcester Co.*, 102 Fed., 808.)

"We are of the opinion that the jurisdiction conferred on the several circuit courts of appeals by subdivision 'b' of section 24 of the recent bankrupt act is the same as that which was vested in the circuit court by the bankrupt act of March 2, 1867." *In re Jacobs*, 99 Fed., at 540 (8th C. C. A.).

This being quite clear, did appeal lie to the supreme court under the old act from an adverse ruling of the circuit court "in revision and review" of the district?

*This court itself has answered that in the negative.* (*Morgan v. Thornhill*, 11 Wall., 65.) and that decision we believe to be conclusive here. On this ground alone the present appeal should be dismissed.

(b)

There is a second inquiry necessary whether appeal lies to this court. It is under section 25 b that such appeals are provided for in the present act, and that section allows them only from a decision "allowing or rejecting a claim." Now, what is meant by a claim? As used in that very clause, indeed, we have no adjudications, but as it occurs in the preceeding paragraph, concerning appeals, 25 a, we have. Does it include a claim *by a bankrupt?* In the case of *In re Columbia Co.*, 112 Fed., 645, the judges of the Seventh Circuit say:

"The last mentioned clause is probably applicable alone to a debt or claims against the bankrupt when presented for proof in due course."

It is apparent that the word must have either its broadest sense or a special one. Now, the broad sense would make it too comprehensive, as was attempted by a *claimant of property* alleging ownership against the trustee, (*In re Whitener,* 105 Fed., 187.)

To this it may be answered that, conceding these decisions, and the definition in the first to be correct, the present claim of exemption by the bankrupt *is* a claim against the estate. We hardly think so. What it really amounts to is an alleged right to detain the policies of insurance. It more nearly resembles a claim to hold specific property than the "claim" which the framers of the bankrupt act had in mind and which they so commonly used throughout the act, that is to say, it is very much like the erroneous "claim" in *In re Whitener, supra.* For what the bankrupts here seek to get back from the trustee, and what the district court, before reversed by the court of appeals, restored to them, was not money but the policies of insurance. (2, 3.)

More directly in point is a case from the Eighth Court of Appeals. There the bankrupt was appealing to the latter court from the district court on the very claim of insurance exemption involved here. His appeal was sought to be dismissed because not taken within the ten days allowed to appeals from "orders allowing or rejecting debts or claims." It was adjudged no debt or claim, and so not within the ten day class but within the broader appellate section 24 of the same act. If that decision be good law, then this is not a debt or claim under 25 b al-

lowing appeals to this court, and, as to appeals *to this court from the courts of appeals,* there is no other provision.

## II.

### *The decree appealed from was not final.*

The decree of the Circuit Court of Appeals, now sought to be reversed, directs (20) that the order of the district court be "revised in accordance with the opinion of this court," which is also the language of the opinion (19). This does not constitute a final decision within the scope of appellate procedure in general, and as the bankrupt act itself in providing for appeals to this court in 25 b has insisted upon a "final" decision, we see no reason why the usual rulings should not control.

It is quite plain that the district court, on receiving the mandate from the court of appeals, would still have a right, while accepting the law as decided, to hear further proof and to take other proceedings. A specific judicial act was not required of it by the court of appeals.

## III.

### *There are no findings under Order* 36.

This court has made itself pretty plain in General Order XXXVI., subdivision 3. An appeal to this court must be based on the following things done *at the time of entering* the judgment or decree: (a) A finding of facts; (b) conclusion of law, the two "stated separately," and, not satisfied with this, you prescribe that the record shall include the pleadings, the judgment or decree, and the two sets of findings. As to the manner of compliance with this rule, we presume it was your intention that courts of appeal

should in their opinions direct the prevailing party to prepare findings and conclusions which should be filed at the time of entering the formal decree on the docket.

Where have appellants sought to obtain a compliance with this rule?

The court of appeals filed a written opinion, it is true, but it hardly seems to have been the intention of this court that a mere opinion should take the place of findings and of conclusions which, beside, were to be stated separately. And there was need of findings. By the act, the amount in controversy must exceed $2000.00 or there is no appeal here. Has anybody yet fixed that amount? We, it is true, had alleged the value of the two policies at "about $2200.00" (9). The word *about* would be a defective one on which to hang pecuniary jurisdiction, either under the removal acts or in original circuit court jurisdiction, or on appeal to this court from the court of appeals. There was further need of findings. It is important here to know whether the two holders were *each* bankrupts, but has any court yet *found* that as a legal finding, undoubted though it may be in fact when the record is read?

## CONCLUSION.

Should our motion to dismiss be sustained, it yet may be argued that this court may hear the controversy by *certiorari*.

Against this the trustee protests because, *first*, there is no motion pending for such a thing, none at any rate, on the 21st of March, when this motion is served (*ante*); and *second*, if such a motion were now to be made, it comes too late. (*Ayres vs. Polsdorfer*, 23 Sup. Ct. Rep., 196, Oct.

Term 1902.) The present appeal was taken in February of last year (20) and the cause docketed in the middle of the following April. We think we are entitled to the rule in the case just cited. No inclination on the part of this court to construe doubtful clauses of the bankrupt act will, we are confident, make you insensible to the rights of the trustee, a litigant entitled to all the rights of litigants yet too often coldly assisted by the courts, and in this case fighting to retain the two insurance policies which constitute *the only assets left to their creditors by bankrupts admitting an indebtedness* of $28000.00 (15-16). The trustee respectfully protests that this is not a case for indulgence to the appellants.

Respectfully submitted,

FREDERICK BAUSMAN,
Counsel for Appellee.

## BRIEF ON THE MERITS.

The Holdens were joint traders (13, II). When they failed and were proceeded against in involuntary bankruptcy, they scheduled liabilities of more than $28,000.00, but denied substantially that they had an asset to their names (15, 16). They acceeded to the proceedings, asked to be declared bankrupts with due discharge, and claimed any exemptions allowed by law (13, III.), *Each* of them was adjudicated a bankrupt (2, 3).

As they denied all assets, the two life insurance policies in question here were of course not disclosed, but these the trustee has discovered and seeks to retain them as a trifle, at least, for creditors. The district court ordered the policies to be surrendered to the Holdens, the court of appeals decided the reverse.

The policies were each on the husband's life in favor of the wife, with reversion in his favor on her prior demise, and the cash surrender value of both was about $2200.00 (9, III., 18).

The question now becomes a simple one, for cash surrender policies under sec. 70 a of the bankrupt act, belong to the trustee unless the Holdens can show them to be exempt. When they seek to show them exempt, it is by sec. 6 of the same act, which allows bankrupts such exemptions as may prevail in the several states. In this State of Washington that exemption is provided for by 2 Ballinger's code, sec. 5252, in these words:

"The proceeds or avails of all life and accident insurance shall be exempt from all liability for any debt."

Our subject divides itself into two heads:

I. Does section 6 make the state insurance exemption *superior to section 70 a?*

II. If it does, do the Holden policies come within that exemption.

*I.*

*Does section 6 make the state insurance exemption superior to section 70 a?*

It is useless for the writer to offer anything here. The Eighth and the Ninth Circuit Courts of Appeals have exhausted this question with contrary results, and they seem to have left nothing necessary to be said.

*Steele v. Buel,* 104 Fed., 968 (8th).
*In re Scheld,* 104 Fed., 870 (9th).
*In re Holden,* 114 Fed., 650 (9th).

The District Court of Maryland is in accord with the Ninth circuit.

*In re Slingluff,* 106 Fed., 154,

And in the Eighth circuit District Judge Shiras, before *Steele v. Buel,* was also against the state exemption.

*In re Lange,* 91 Fed., 361.

*II.*

*Do the Holden policies come within the state exemption?*

We are now narrowing the inquiry. We are supposing here that the state exemption paragraph of the bankrupt act does prevail over the insurance clause, and that, consequently, the Washington statute must be considered. Now, would that statute protect *both* these bankrupts? Let us see.

*Each of the Holdens was adjudged a bankrupt* (2, 3), *and the creditors of each are the same* (15).

The question, consequently, is not merely whether the creditors of Holden, the insured, can have the policies, or their cash surrender, but whether the creditors of Mrs. Holden, the beneficiary, can. Let us take the latter. Did the Washington law intend to protect a beneficiary from *the beneficiary's own creditors?*

Then comes a second question. Suppose the Washington statute does allow a beneficiary such exemption, did it really intend to allow *either insured or beneficiary* exemption of cash policies, that is to say, does "life insurance" in the statute mean investment policies or the investment part of policies?

These two questions we will discuss together.

We answer both of them, no. There has been only one decision in this state under that statute (*In re Heilbron's Estate,* 14 Wash., 536), and that was an attack by creditors of the *insured* against the beneficiary. This leaves the present question an open one. We must, therefore, look again at the statute, and, if that be not positive, we must look behind it to the manifest purpose of such laws, and to public policy, which is the chief source of law and which may be resorted to under our jurisprudence when precedents are not already established or statutes clear. The thing need not long be debated. While this sort of legislation has undoubtedly been stimulated by insurance companies to help their business, it has great merit. That merit consists in protecting from creditors the failing debtor's family, so that they may not feel, in one hard blow, the loss, not only of his present fortune, but also of

that mortuary fund which the ingenious law of contract has provided as a resource against despair. That in our opinion, is what they were intended to supply. If they are intended to do more, they are dishonest. If, in other words, these laws mean that I may hold a hundred thousand dollars in cash surrenderable policies, payable to myself but exempt from my creditors, they are bad, unwholesome laws. The statute of Washington, indeed, is sweeping enough to allow this sort of injustice, but until the highest court of that state so construes it, other tribunals ought not to say that this is what it means.

The true purpose of such legislation is subserved by interpreting it as protecting beneficiaries from the debts of the insured. This will protect insolvents' families. True, it happens in the present instance that the wife, being a trader, too, is a beneficiary having creditors, so that, in point of fact, this family will not enjoy the real fruits of the legislation. The instance at bar, though, is not a very common one, and it seems better, better far, to sustain our reasonable construction of this law than to interpret it so as to permit the boldest of wrongs. Nor does the schedule of the Holdens (as exhibited in this record) invite us to lenity.

It is harmful construction of the Washington law to say that it permits either the insured to make policies payable in cash to himself exempt from his debts, or a beneficiary to inherit or otherwise receive the cash results of a policy exempt from creditors of himself. Will it be contended under the Washington statute that by the death of a relative I may receive the proceeds of a large insurance policy and yet hold it secure against debts of my own, both past and future?

As to beneficiaries Iowa furnishes a just construction of such laws. There the statute provides that "the avails of any life insurance are not subject to the debts of the deceased." Now, what deceased? *Murray v. Wells,* 53 Iowa, 256, 5 N. W. 182, is a case as follows. The husband insured himself for the benefit of his wife, but the wife died and her heirs assigned their rights under the policy to T. H. W., a son, who also died. The father, the insured, was still living. Now, the dead son's representatives had obtained a paid up policy. Was this subject to his debts? The statute said "debts of the deceased," but the court held that this meant debts of the deceased *insured.* A similar spirit of construction against beneficiaries is shown in *Reighart v. Harris,* 51 Pac., 788, 6 Kans. App., 339.

This throws us back again to scan the statute. Its language, we concede, is broad enough to protect a life insurance inheritance from the *beneficiary's own creditors.* But if it is broad enough for that, it is broad enough for something equally unnecessary and more mischievous. We mean that it is then broad enough to protect from creditors of the *insured* a policy (or "bond," as now called), payable in cash to the insured debtor himself. There is no avoiding this disastrous conclusion. "The proceeds or avails of all life and accident insurance shall be exempt from all liability for any debt." If this means that creditors *of the wife,* the beneficiary, may not touch her property because it came of life insurance, that creditors of a beneficiary nephew or child may not, it means also that creditors of the insured may not, even as against the debtor, when he gets the proceeds or avails in his own lifetime. This last is intolerable. It actually would permit a failing debtor, foreseeing his collapse, to invest a large

sum in one of these cash surrender bonds, payable to himself. It would manifestly encourage him to do so. Another illustration. A debtor might keep his wife's life insured payable to *him*, and put it on a cash surrender basis. Then he fails and walks the streets with an ample fund secure. Equally would such doctrine permit elderly relatives to endow insolvent nephews or sons with large amounts of cash available to no creditor of either of them.

To what, then, do we come? That the Washington statute, whether passed to promote the insurance business or at the instance of debtors, is so sweeping as, if taken literally, to conflict with the manifest intention of the bankrupt act and of public policy. If the last be thought too vague a thing, then let us resort to construction of the statute according to the usual standards. What did "life insurance" probably mean to the members of the local legislature? What does "the proceeds of life insurance" mean to the average man? Is it not a fund realizable by death? Is it not a species of inheritance?

As to the endowment features we find in Nebraska a full discussion of how such policies differ from insurance. Kent's definition of life insurance is there adopted "a contract to pay a certain sum upon the death of the person whose life is insured." *Talcott v. Field*, 52 N. W., 400, 34 Neb., 611.

The cash surrender features are always an afterthought in the popular acceptation of life insurance. Notice here the words of the statute. It does not say "the proceeds or avails of any life insurance *policy*," but merely of *life insurance*. Now, it is well known that not only in common parlance does life insurance mean simply insurance on one for the benefit of another after death, but in insurance

language the endowment feature is totally distinct from the insurance feature. The endowment is a superadded thing, a creation of more recent times, separately calculated. In view of the many statutes of this kind fostered by insurance companies throughout the country, it is not illiberal, we think, to ask that they be construed as such phraseology is commonly understood and even technically applied in that science or business.

We conclude that (a) the Washington statute never meant to save beneficiaries from their creditors; (b) even if it did, it meant only cases of "insurance" proper.

If it be said that the interest of the Holdens in these policies is joint, let it be remembered that they have the same creditors and the same assignee to make surrender.

Respectfully submitted.

FREDERICK BAUSMAN,
Counsel for Appellee.

## ADDENDA.

*On Motion to Dismiss.*

We have just learned that appellants have sought to cure this defective appeal by a certificate from Mr. Justice McKenna obtained almost simultaneously with the service of our motion. Does the certificate, however, mend the matter? We think not.

(a) This certificate under the bankrupt act is not, to be sure, a proceeding in certiorari, or subject to such rules, so our citation of *Ayres v. Polsdorffer* is not now in point. But "certificate" in connection with "question," as it is a phrase long used in federal appellate practice, must have been intended to come within some existing class or other. To us it seems to be only another form of the certificate required on direct appeal from the circuit court to the supreme. That requirement, existing before the court of appeals act, was imported into the latter, and, when imported, was always held to mean in the new act what it meant in the old. By numerous decisions of this court it had to present a precise question or questions not involving a study of the whole record. Moreover, it had to be signed *at the same term* at which the decision appealed from was rendered. If the bankrupt act has in turn been a borrower of this phrase, we should have no doubt of its taking it with its usual meaning, and judged by that, this certificate, signed long after the term and formulating no definite questions, is defective.

(b) By your General Order XXXVI it is provided that appeals must be taken within thirty days. If this appeal was not a good appeal without a certificate, we hardly think it ought to be made a good appeal by a certificate issued more than a year afterwards (January 16, 1902, and March 20, 1903, are the respective dates). The practice under this bankruptcy appeal provision is yet to be settled. The certificate may, on the one hand, be construed as a very general sort of cure-all subject to little rule. It may, on the other hand, be regarded as another kind of certiorari saving form, notice, and expense of application, besides being obtainable in vacation. But under whichever head it falls (in our opinion the latter), it surely is subject to some limitations of time, if not also of form. The adverse party has a right to know early where he stands and not to be kept wondering whether the appellant will try to mend matters by a certificate or whether the court will grant a certificate even if applied for. The true way to look at it is this. The certificate should be obtained as a *basis* for appeal. Manifestly it cannot of itself operate as a transfer of the cause. Nobody would claim that. The usual order allowing appeal has to be signed by some judge before the clerk may transmit the record. If, therefore, it is intended to be a basis for appeal, it must be reasonably precise and within time.

The fault here lies with counsel who prepare such defective papers, as judges must usually be expected to sign them for what they are worth, and we do not think counsel should be allowed to amend this appeal by a step so tardy and informal as this.

(c) We have occasion to recur again to the need of findings. In appellant's brief, now received, we find a controversy raised as to whether these policies do have a cash surrender value. This we thought settled. If it is not settled, findings are necessary. But there are here no findings, and, under your Order XXXVI, how can you, or should you, proceed without them?

*ON THE MERITS.*

There are a great many cases touching the rights of beneficiaries as against creditors of either the insured or the beneficiary but a study of them is scarcely profitable here, for this is plainly a case of statutory construction. To those cited in the original part of this brief, we may add *Yale v. McLaurin*, 66 Miss. 461. There the statutory words exempted the insurance from the debts "of the person paying the premium." Now, the *beneficiary* paid the premium in that instance, and it surely was plausible to say that the letter of the statute saved the insurance from his debts, but the court held that the purpose of the law was manifest enough to prevail over this literal construction. In Minnesota, the court went further. It there decided (*How vs. How*, 59 Minn. 415, 61 N. W. 456) that a statute exempting insurance without limit of amount was unconstitutional as violating the Minnesota constitution, which empowered the legislature to exempt "a reasonable amount of property." The statute, it was held, would permit unreasonable amounts to be exempted in the form of life insurance. That decision is applicable here, we think, for our Washington constitution (Art. XIX, 2 Balling,

p. 848) has indicated restrictions. "The legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families." Whether Mrs. Holden is the head of a family within this is doubtful, but, passing that, what is meant by "a certain portion?" It must mean what the Minnesota constitution meant, reasonable.

Respectfully submitted,

FREDERICK BAUSMAN,
Counsel for Appellee.

# Supreme Court of the United States.

No. 38.—October Term, 1903.

D. N. Holden and Lizzie Holden, Bankrupts, Appellants,
*vs.*
J. A. Stratton, Trustee.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

[November 16, 1903.]

Two separate proceedings were commenced in the District Court of the United States for the District of Washington, on January 19, 1901, against D. N. Holden and Lizzie Holden, to the end that each be adjudicated a bankrupt, which were consolidated, and on the ensuing twenty-fifth of February they were, respectively, so adjudicated. The creditors of each of the bankrupts were the same.

Thereupon J. A. Stratton was duly elected trustee in bankruptcy of the estate of each of the bankrupts and qualified as such. The bankrupts, and each of them, applied for exemption in their favor of two certain policies of life insurance in the hands of the trustee. D. N. Holden was insured, and Lizzie Holden was the beneficiary, in both, with the provision that if she should not survive him, payment should be made to his executors, administrators and assigns.

The exemption was disallowed by the referee, who reported his action to the court. The bankrupts filed exceptions to the report, and the court on July 16, 1901, set it aside and adjudged the policies to be exempt. Stratton then filed a petition in the Circuit Court of Appeals for the Ninth Circuit for a revision of this order. It was therein alleged among other things that the policies had a present cash surrender value combined of about twenty-two hundred dollars. The Circuit Court of Appeals, accepting the ruling of that court in the previous case of *In re Scheld*, 104 Fed. Rep. 870, held that the policies were not exempt, and decreed a revision of the order of the District Court accordingly. 113 Fed. Rep. 141. From this decree an appeal was prayed to this court and allowed February 12, 1902, and the record was filed here April 14, 1902. And subsequently a certificate of a justice of this court was filed herein that in his opinion the determination of the questions involved was essential to a uniform construction of the bankruptcy act throughout the United States.

The appeal was submitted on a motion to dismiss, and also on the merits.

Mr. Chief Justice Fuller delivered the opinion of the Court:

It will be perceived that the jurisdiction of the Circuit Court of Appeals was invoked on an original petition under section 24*b* of the bankruptcy

law, which provides: "The several Circuit Courts of Appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

This supervisory jurisdiction in matter of law was conferred on the Circuit Courts by the act of March 2, 1867, (14 Stat. 518, c. 176, § 2; Rev. Stat. § 4986,) and it was settled under that act that appeals to this court did not lie from the decisions of the Circuit Courts in the exercise of that jurisdiction. *Morgan* v. *Thornhill*, 11 Wall. 65; *Conro* v. *Crane*, 94 U. S. 441. The ruling is decisive here unless the present act elsewhere otherwise provides. But this it does not do, the special and summary character of the revision contemplated being substantially the same as in the prior act, and the provision for appeals not embracing appeals from decrees in revision.

Section 25*a* provides "that appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals of the United States, and to the Supreme Court of the Territories, in the following cases, to wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over."

And section 25*b* for appeals to this court "from any final decision of a Court of Appeals, allowing or rejecting a claim under this act," where the amount in controversy exceeds the sum of two thousand dollars, and the question involved was one which might have been taken from the highest court of a State to the Supreme Court of the United States; or where some justice of the Supreme Court certifies that "in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States."

This case was not taken to the Court of Appeals by appeal, as in equity cases, to be re-examined on the facts as well as the law, nor could it have been, for it was not one of the cases enumerated in section 25*a*. The order of the Circuit Court was not "a judgment allowing or rejecting a debt or claim of five hundred dollars or over," or the revising order of the Circuit Court of Appeals, "a final decision, allowing or rejecting a claim," within the intent and meaning of either subdivision *a* or *b*. By section 2, sub. 2, courts of bankruptcy are vested with the power to "allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;" and section fifty-seven comprehensively covers the subject of the proof and allowance of claims, treating them as moneyed demands.

And while the word "claim" is used in its signification of the demand or assertion of a right in sub. 11 of section 2, in respect of "all claims of bankrupts to their exemptions," it is also used in many parts of the act, and, as we think, in section 25, as referring to debts, (which by sub-sect. 11 of section 1 include "any debt, demand or claim provable in bankruptcy,") presented for proof against estates in bankruptcy. *Hutchinson* v. *Otis*, 190 U. S. 552, 555; *In re Whitener*, 105 Fed. Rep. 180; *In re Columbia Company*, 112 Fed. Rep. 645.

The allowance or rejection of a debt or claim is a part of the bankruptcy proceedings, and not an independent suit, and under the act of 1867 it was held that this court had no jurisdiction to review judgments of the Circuit Courts dealing with the action of the District Courts in such allowance or rejection because they were not final. *Wiswall* v. *Campbell*, 93 U. S. 347; *Leggett* v. *Allen*, 110 U. S. 741. The jurisdiction now given is carefully restricted and cannot be expanded beyond the letter of the grant. It is an exception to the general rule as to appeals and writs of error obtaining from the foundation of our judicial system. *McLish* v. *Roff*, 141 U. S. 661.

The distinction between steps in bankruptcy proceedings proper and controversies arising out of the settlement of the estates of bankrupts is recognized in sections 23, 24 and 25 of the present act, and the provisions as to revision in matter of law and appeals were framed and must be construed in view of that distinction. *Denver First National Bank* v. *Klug*, 186 U. S. 202; *Elliott* v. *Toeppner*, 187 U. S. 327, 333, 334.

Section 6 of the act of March 3, 1891, has no application, as that refers to cases carried to the Circuit Court of Appeals by appeal or writ of error. But in view of the terms of that act and of the nature of the writ, we have held that under a reasonable construction of subdivision *d* of section 25, certiorari lies to decrees in revision. *Bryan* v. *Bernheimer*, 175 U. S. 724, Id. 181 U. S. 188; *Mueller* v. *Nugent*, 180 U. S. 640, Id. 184 U. S. 1; *Louisville Trust Company* v. *Comingor*, 181 U. S. 620, Id. 184 U. S. 18. In the case first cited it is pointed out that the Circuit Court of Appeals treated the case as if before it on a petition for revision though it had been carried there by appeal, and we considered the decree as rendered in the exercise of the supervisory power. 181 U. S. 192, 193.

*Appeal dismissed.*

True copy.

Test:

*Clerk Supreme Court, U. S.*

END OF CASE